September 8, 1954
Opinion No. 54-131

TO: Mr. G. A. Bushnell, Director
Division of Insurance
Arizona Corporation Commission
Capitol Building Annex
Phoenix, Arizona

RE: What constitutes insurance?

QUESTIONS:

1. Under the present law of Arizona does the enclosed privileges and benefits of membership constitute insurance?

2. Under the new insurance code effective January 1, 1955, will the enclosed privileges and benefits of membership constitute insurance?

3. If the answer to Question 2 is "Yes", wherein will said privileges and benefits of membership be classified within the new code and what will be the security (capital fund) required?

4. Under the present law, if a rider were attached to the said privileges and benefits of membership deleting exception E so that said privileges and benefits would apply to actions arising out of the ownership, custody, maintenance, operation or use of a motor vehicle, would the privileges and benefits then constitute insurance?

5. Under the insurance code to be effective January 1, 1955, what would be the answer to Question 4?

6. By virtue of the provisions of Chapter 66, Article 8 of the Arizona Code Annotated, do three or more of the services enumerated in Section 66-803, A.C.A. 1939, have to be transacted for by virute of the membership in a motor club service association before a $25,000.00 bond is required to be deposited by said association?

7. After January 1, 1955, if an association should qualify under the provisions of Chapter 66, Article 8, Arizona Code Annotated, would any other security be required other than a $25,000.00 cash deposit or bond as provided by Section 66-806 even if the privileges and benefits of membership of the association would, in our opinion, constitute insurance?

The membership in the association is substantially as follows: upon payment of a membership fee the member receives for a specified term certain privileges and benefits which are summarized herein as follows:

1. The association shall reimburse the member for fees incurred and paid by the member for professional legal services rendered by any lawyer duly admitted to practice law in the state of Arizona, all in accordance with the following schedule and thereafter as set forth, a schedule of benefits to be paid for certain legal services.

2. The association as agent of the member will secure bail bond under certain conditions.

3. The association as agent of the members will secure appeal bond under certain conditions.

4. The association will not provide defense for the following

types of legal actions:

A. Criminal or civil actions brought or caused to be brought by a husband against a wife, a wife against a husband, a child against a parent or parents, a parent against his or their child or children;

B. Criminal actions insofar as they involve crimes amounting to felonies as defined by the laws of the State of Arizona, or the United States of America; or

C. Civil actions insofar as they involve garnishment, attachment, replevin or any action arising out of debt.

D. Actions insofar as they involve bonds to keep the peace.

E. Criminal or civil actions arising out of the ownership, custody, maintenance, operation, or use of a motor vehicle.

5. Deferred payments are provided for.

6. General terms and conditions are set forth, such as the agreement embodies all agreements, right of association to cancel membership, reservation in the association of right to make appointment with lawyer of the member's own choice, and the reservation in the association of the right to determine what is a reasonable attorney's fee.

The statutory provisions which are pertinent to this opinion are set forth in Sections 61-101 and 61-102, A.C.A. 1939, 1952 Cumulative Supplement, as follows:

> "61-101. Definitions.--In this chapter, unless the context otherwise requires:
> * * * * *
> 'Insurance' means: A contract of insurance or an agreement by which one (1) party, for a consideration, promises to pay money

or its equivalent or to do an act valuable to the insured upon the destruction, loss or injury of something in which the insured has a pecuniary interest, or in consideration of a price paid, adequate to the risk, becomes security to the other against loss by certain specified risks;"

* * * * *

"61-102. Classification of insurance. Insurance business in this state shall be divided into the following classes:

* * * * *

12. Vehicle insurance, includes insurance against: 12a. loss or damage resulting from any cause to any land vehicle except railroad rolling stock, or aircraft or any draft or riding animal and its equipment, and against any loss or liability resulting from or incidental to ownership, maintenance or use of such vehicle, aircraft or animal; 12b. if issued as part of insurance thereon, accidental death or injury to individuals while in, entering, alighting from, adjusting, repairing, cranking, or caused by being struck by a vehicle, aircraft, or draft or riding animal.

13. Miscellaneous insurance; insurance upon any risk not included under any of the foregoing classes, and which is a proper subject of insurance, not prohibited by law or contrary to sound public policy."

The new Arizona Insurance Code effective January 1, 1955, Twenty-First Legislature, Second Regular Session, Chapter 64, contains the following provisions which are pertinent to this opinion:

"ARTICLE I. SCOPE OF CODE.

* * * * *

Sec. 2. "INSURANCE" DEFINED. 'Insurance' is a contract whereby one undertakes to indemnify another or to pay a specified amount upon determinable contingencies."

"ARTICLE 4, KINDS OF INSURANCE; REINSURANCE; LIMITS OF RISK.

Section 1. DEFINITIONS NOT MUTUALLY EXCLUSIVE. It is intended that certain coverages may come within the definitions of two or more kinds of insurance as set forth in this article, and the fact that such a coverage is included within one definition shall not exclude such coverage as to any other kind of insurance within the definition of which such coverage likewise reasonably is includable.

* * * * *

Sec. 4. 'PROPERTY INSURANCE' DEFINED. 'Property insurance' is insurance on real or personal property of every kind and interest therein, against loss or damage from any or all hazard or cause, and against loss consequential upon such loss or damage, other than noncontractual legal liability for any such loss or damage. Property insurance shall also include miscellaneous insurance as defined in section 7 (k) of this article except as to any noncontractual liability coverage includable therein.

* * * * *

Sec. 6. 'VEHICLE INSURANCE' DEFINED. 'Vehicle insurance' is insurance against loss of or damage to any land vehicle or aircraft or any draft or riding animal or to property while contained therein or thereon or being loaded or unloaded therein or therefrom, from any hazard or cause, and against any loss, liability or expense resulting from or incident to ownership, maintenance or use of any such vehicle, aircraft or animal; together with insurance against accidental death or accidental injury to individuals, including the named insured, while in, entering, alighting from, adjusting, repairing, cranking, or caused by being struck by a vehicle, aircraft or draft or riding animal, if such insurance is issued as a part of insurance on the vehicle, aircraft or draft or riding animal.

Sec. 7. 'CASUALTY INSURANCE' DEFINED 'Casualty insurance' includes vehicle insurance

> as defined in section 6 of this article, and in addition, includes:
>
> * * * * *
>
> (k) Miscellaneous, Insurance against any other kind of loss, damage, or liability properly a subject of insurance and not within any other kind of insurance as defined in this chapter, if such insurance is not disapproved by the director as being contrary to law or public policy."

The association membership here in question states this is a "non-assessable club membership and is not a policy of insurance." Our court has stated "the nature of a thing must be determined by what it is and not by what it is called." CORPORATION COMMISSION v. EQUITABLE LIFE ASSUR. SOC., 73 Ariz. 171.

In the case of EX REL. PHYSICIANS' DEFENSE CO. v. LAYLIN, (Supreme Court of Ohio), (Nov. 28, 1905), 76 N.E. 567, the court had under consideration an agreement of which it stated on page 568 as follows:

> "* * *In Joyce on Insurance, at section 24, it is said: 'It is elementary that the contract of insurance, other than that of life and of accident, where the injury results in death, is one of indemnity. By indemnity is meant that the party insured is entitled to be compensated for such loss as is occasioned by the perils insured against, in precise accordance with the principles and terms of the contract of insurance; the right to recover being commensurate with the loss sustained.' Measured by these definitions, and assuming the same to be correct, whether or not the Physicians' Defense Company is an insurance company, and the business it proposes to transact is insurance business, must be determined from its charter, and from a consideration of the character, terms, and provisions of the contract it issues and sells."

and at page 569:

> "* * *The undertaking of the company is not

> that it will compensate the physician or surgeon for loss or injury he may actually sustain, but only that it will, after suit brought against him, undertake and conduct for him his defense, and thereby, it may be, protect him against liability to loss, by preventing judgement being obtained against him. If the company successfully performs its contract, no loss or injury results to the defendant. But, if not, and judgment be obtained against him, there is no obligation or liability on the part of the company to pay or satisfy said judgment or any part of it. Obviously, we think, such contract is not one for indemnity, for under it the liability of the company ceases at the precise point and time that the right to indemnity attaches or begins. We are of the opinion, therefore, that the plaintiff company is not an insurance company, nor the contract it issues an insurance contract."

This court held that the contract contemplated the professional business of practicing law, which may not be transacted or carried on by a corporation in the state of Ohio because prohibited by statute.

In the case of VREDENBURGH v. PHYSICIANS' DEFENSE CO. (1906) 126 Ill. App. Court Reports, 509, the court stated at page 513:

> "* * *By it (the contract) appellee undertakes at its own cost and expense to defend the other party to the agreement against suits of a specified character, brought within a specified time, in consideration of a fixed payment which may be deemed as in the nature of a retainer, such as an attorney may lawfully receive from a client. The company does not undertake to indemnify the holder of its agreement against a judgment, or to pay such judgment nor any part of it, not even the costs of suit. It is true that in making defense it may have to pay out more than the sum it receives. So also an attorney who may agree with a client to defend a suit for an agreed compensation may find himself

> compelled to expend time and labor worth more than he has agreed to charge and receive. The contract has no element, so far as we can discover, of indemnity. Appellee does not insure the holder against suits for malpractice. It merely makes a business of defending against them when they are brought, provides legal services for its patrons, and we perceive no reason why it should be compelled to comply with the requirements of the statutes referred to relating only to insurance companies." (Parenthetical material supplied)

This case does not apply to the contract with which this opinion is concerned, since in the contract before us, there is a specific provision for reimbursement of a member for fees incurred, as distinguished from a contract to provide services as in the above case. If the contract were one contracting to provide legal services as in the case cited above, it would, in our opinion, constitute the practice of law by an association or corporation without a license.

In the case of PHYSICIANS' DEFENSE CO. v. O'BRIEN, (Supreme Court of Minnesota, April 1, 1907) 111 N.W. 396, the terms of the contract provided that in case the physician shall be sued for malpractice, said company undertakes to arrange his defense in the matter as therein provided, but only to the extent set forth therein. The court said at page 397:

> "The contract is very carefully and skillfully framed for the purpose of conveying the idea that it is an agreement for the performance of services and not for the indemnification of the physician against loss; but, unless we admit that language was invented to enable us to conceal our thoughts, this is a contract of insurance. * * *"

and at page 398:

> "* * *We are not required to go afield for a definition, as Rev. Laws 1905 §1596, states that 'insurance within the meaning of this chapter is any agreement whereby any party

> for a consideration undertakes to indemnify another to a specific amount against loss or damage from a specified cause, or to do some act of value to the assured in case of such loss or damage.' * * *"
>
> "Our attention has been called to Vredenburgh v. Physicians' Defense Co. 126 Ill. App. 509, and State v. Laylin, 76 N.E. 567, 73 Ohio St. 90, where it is held that this contract is a contract for services only. We are not able to accept the conclusion reached in these cases, because they ignore the fact that a physician is subject to a risk of financial loss from the bringing of an action for malpractice entirely separate and distinct from the loss which results when he is required to pay a judgment.* * *"

In PHYSICIANS' DEFENSE CO. v. COOPER (9th Circuit 1912) 199 Fed. 576, the court held that a contract to defend against malpractice was insurance. The California definition in question was:

> "'A contract whereby one undertakes to indemnify another against loss, damage or liability arising from an unknown or contingent event.' Section 2527, Pomeroy's Civil Code of California."

After quoting numerous general definitions of insurance, the court said, "The principal ingredients of such a contract are consideration, the risk, and the indemnity." The court also stated at page 580 and 581:

> "* * *It seems plain that when the holder is sued for civil malpractice, which he deems is wrongful, and the necessity of making defense is thrust upon him, he must suffer loss, damage, or liability within the meaning of the contract to the extent that he is obliged to employ attorneys and meet the expenses of the trial in regular course. He must pay his attorneys for their services in his behalf, and he must pay his costs on the trial. These are the contingencies which the Defense Company agrees to meet.* * *

* * * * *

* * *The contract, reduced to its simplest idea, is but an agreement to pay the expenses and costs that the holder would have to pay in the contingency specified. This is indemnity pure and simple, and with whatever verbiage the contract may be clothed it does not serve to cover its real purpose, which is one to indemnify the holder against damage and liability for attorney's expenses and costs of defense, in the event he is sued for malpractice.

* * * * *

* * *The very uncertainty of the amount to be paid by the Defense Company to meet the exigency contracted against is persuasive that the contract is not one of hiring, but one rather of indemnity. And such is our conclusion.* * *"

In STATE v. UNIVERSAL SERVICE AGENCY (Washington 1950) 151 P. 768, a corporation contracted with subscribers to procure medical services, drugs and merchandise at a relatively low rate or discount but the corporation did not guarantee performance by the individuals who were to furnish such service, etc. The court held that such a contract was not insurance, since no hazard or peril was insured against.

ALLIN v. MOTORIST'S ALLIANCE (Ky. Court of Appeals, 1930) 29 S.W. 2, 19, 71 A.L.R. 688, is a case wherein the contract to provide services of an attorney, free of charge to contract holders, to defend them under certain circumstances in suits arising out of the use of automobiles, and to perform certain other services, was one of insurance, requiring the party undertaking to furnish such legal services to comply with the insurance laws. The holding is based upon the statutory provision in that state declaring it lawful for a company to write insurance for the purpose, among others, of insuring owners of automobiles against "such losses as arise out of the ownership, operation, or maintenance of the same," the court taking the view that it was not called upon to align itself on either side of the general question apart from the statute referred to.

In STATE v. BEAN (Minnesota 1934) 258 N.W. 18, insurance was

defined by statute as follows:

> "* * *: 'Insurance is any agreement whereby one party, for a consideration, undertakes to indemnify another to a specified amount against loss or damage from specified causes, or to do some act of value to the assured in case of such loss or damage.'"

The court stated:

> "Nothing more need be said to show that the contract in question was one of insurance under the statute and the rule of Physician's Defense Co. v. O'Brien, 100 Minn. 490, 111 N.W. 396. The contract obligated the issuer to do not one, but possibly several acts 'of value to the insured in case of such loss or damage.' The statute declares the plain fact that rendition of services may be as much compensation for loss from a stated event as would be the payment of money."

Section 61-101, A.C.A. 1939, 1952 Cumulative Supplement, includes, to do an act of value as well as to pay money.

In CALIFORNIA PHYSICIANS' SERVICE v. GARRISON (November 1946) 172 P.2d 4, 167 A.L.R. 306, the court held that a medical service contract was not insurance, saying at 167 A.L.R. 316:

> "The business of the service lacks one essential element necessary to bring it within the scope of the insurance laws, for clearly it assumed no risk. Under the provisions of the contracts or group agreements, it is a mere agent or distributor of funds. It does not promise the beneficiary members that it will provide medical care; on the contrary, 'the services which are offered to . . . beneficiary members of C.P.S. are offered personally to said members by the professional members of C.P.S. . . .'"

There was a specific statute providing for the organization of a corporation to provide medical services on an ability-to-pay-for basis, and the court held that this enactment determined to the

limited extent specified the state's social policy in regard to the corporate practice of medicine, and the legislation necessarily intended that such organization should be exempt from regulations by the Insurance Commission.

In CONTINENTAL AUTO CLUB v. NAVARRE (Michigan 1953) 60 N.W. 2d 180, the court considered an agreement which provided:

> "'$5,000 Bail Bond for Manslaughter and Traffic Violation.
>
> * * * * *
>
> 'Attorney Services - - - -
>
> 'Members are empowered to use Attorney Services on Credit of CAC. Attorneys paid direct -- per schedule -- (Members are not eligible for services if charges involve Liquor in any way).
>
> '(1) Attorney services for: General Legal Advise on matters pertaining to the use and operation of members car up to $10.00.
>
> '(2) For defense when charged with a violation of the motor vehicle laws up to $20.00.
>
> '(3) For representation before the state motor vehicle dept. involving suspension or revocation of members license up to $20.00.
>
> '(4) For representation before coroner's inquest, up to $20.00.
>
> '(5) For defense in suits involving damages to prop- matters pertaining to the use and operation of mem- Automobile up to $50.00.
>
> '(6) For defense of Manslaughter Charges up to $100.00 amounts listed apply to trials.
> * * *
>
> - - -
>
> 'Bail Bond Service to $5000.00.

'This service not available if charges involve liquor.

'(1) CAC assures members of their freedoms.

'(2) Club will arrange for bail through Bondsmen the nation over.'"

The court pointed out that the Michigan Insurance Code contained no definition of the word "insurance". This is not the situation in Arizona. Without a definite definition of insurance, the court found it necessary to quote an excerpt from its Insurance Code covering insurance to illustrate, in part, what the legislature had in mind in using the word "insurance" elsewhere in the code. The court has stated at page 182:

> "In view of the use of the word insurance in general in the insurance code, and as the word is generally used in cases that deal with the subject of insurance, we are of the opinion that by engaging in the business of furnishing its members under its contract the benefits hereinbefore recited, the plaintiff corporation was and is in fact engaging in the business of insurance."

Annotations on this subject are to be found in 63 A.L.R. 766, and 100 A.L.R. 1455.

Although some of the earlier cases cited do hold that agreements such as the one here in question are not insurance, the later cases hold contra and they are, in our opinion, the better reasoned cases. It is, therefore, our opinion that the definitions of insurance under Section 61-101, A.C.A. 1939, as amended, and under the new Arizona Insurance Code, do cover the agreement and, therefore, questions one, two, four and five must be answered in the affirmative.

In answer to question number three it is our opinion that Article 3, Section 10 of the new Insurance Code applies. This insurance is Miscellaneous Insurance as defined in Article 4, Section 7 (k) and is classified under Casualty as a general classification, therefore, the capital funds required is a minimum of $250,000.00.

The provisions of Section 66-801, et seq., apply only if a

motor club, for a consideration, contracts to render motor club service as defined by Section 66-803, A.C.A. 1939, as follows:

> "66-803. Motor club service defined.--Motor Club Service shall consist of the rendering, furnishing, or procuring of towing service, emergency road service, insurance service, bail bond service, legal service, discount service, map service, and/or touring service, or any three (3) or more of such services to any person in connection with the ownership, operation, use or maintenance of a motor vehicle by such other person in consideration of such person being or becoming a member of any association rendering, procuring or furnishing the same, or being or becoming in any manner affiliated therewith, or being or becoming entitled to receive membership or other motor club service therefrom, by virtue of any agreement or understanding with any such association."

Ordinarily the term "and/or" is used to avoid a construction which, by the use of the disjunctive "or" alone, would exclude the combination of several of the alternatives, or, by the use of the conjunctive "and" alone, would include the efficacy of any one of the alternatives standing alone. It takes the place of the addition, after several alternatives connected simply by "and", of a qualifying phrase such as "or either" or "or any combination thereof" and, after several alternates connected by "or," it takes the place of such phrases as "or both," or "or any combination thereof".

An annotation of the various criticisms of the use of this phrase will be found at 113 A.L.R. 1367. It has been characterized as an "interloping disjunctive-conjunctive-conjunctive-disjunctive conjunction", MINOR v. THOMASSON (Ala.) 182 S. 16.

It appears that the legislature did not intend that the "and/or" apply to all services so as to connect them in both the conjunctive and disjunctive, since the statute provides for a combination of three or more services. The obvious purpose of this provision is to make sure that if all services are not furnished, three or more services will constitute motor club

service, and this is inconsistent with an interpretation that two or more services can constitute motor club service. The term "and/or" appears to apply only to towing service, since "and/or" is not set off by commas from towing service and the other types of service listed therein.

In answer to question six it is our opinion that if any motor club provides all the services listed, or provides any three or more such services, or provides towing service alone, or in combination with any other listed service, then the motor club must be licensed and a bond deposited, pursuant to Section 66-801, A.C.A. 1939, et seq.

One of the services included in the definition of motor club service is "insurance service". "Insurance service" is defined in Section 66-804, A.C.A. 1939, as follows:

> "66-804. Definitions.--For the purposes of this act,
>
> * * * * *
>
> 'Insurance service,' any act consisting of the selling or giving with a service contract or as a result of membership in or affiliation with an association of a policy of insurance:"

This definition does not contemplate that a motor club may act as an insurer without complying with the general insurance laws of this state. A motor club may sell or give a policy of insurance to a member, but such insurance policy must be issued by a qualified company and sold by a licensed agent.

Motor club service as defined by the act includes many types of service, but nowhere in the act is there granted the right to perform such services without regard to the laws pertaining to each type of the service. The act does not grant authority to perform the service listed but, in effect, states that, if certain services are performed, then a license must be obtained. For example, a motor club may provide towing service, but if it has its own tow truck it must still comply with the state law covering registration and licensing of such truck.

In answer to question number seven it is our opinion that in addition to the $25,000.00 deposit required for a motor club license such a club must have minimum capital funds and comply with the new Arizona Insurance Code if it acts as an insurer.

ROSS F. JONES
The Attorney General

JAMES E. HUNTER
Assistant to the
Attorney General

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